

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-49/51348

PRELIMINARY RECITALS

Pursuant to a petition filed November 27, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Portage County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on December 27, 2001, at Stevens Point, Wisconsin.

The issue for determination is whether petitioner divested by paying relatives for her care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Attorney Amy J. Eddy
Anderson, Shannon, et. al.
1257 Main Street
PO Box 228
Stevens Point, WI 54481-0228

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Maxine Hogan, ESS
Portage County Dept Of Human Services
817 Whiting Avenue
Stevens Point, WI 54481-5292

ADMINISTRATIVE LAW JUDGE:

Kenneth P Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Portage County.
2. On September 10, 2001 petitioner's Power of Attorney (POA) applied for Institutional MA on petitioner's behalf.
3. Petitioner made the following transfers prior to the MA application:
 - 6/20/01 - gift to brother of \$6,275
 - gift to brother of \$6,275
 - \$150 to brother for services

- \$150 to brother for services
 - \$150 to sister for services
 - 6/23/01 - \$250 to brother for services
 - 8/5/01 - gift to brother of \$3,000
 - \$2,000 to sister-in-law for services
 - 9/3/01 - \$600 to sister-in-law for services
4. The money received for services was for shopping, yard work, meals, transportation, housework and housework. There was no contract written prior to the services being performed.
 5. That the compensation for the services rendered was reasonable pursuant to a 2000 Occupation Wage Survey Report. Exhibit 1
 6. Of the amounts listed in Finding of Fact #3, a total of \$16,250 was divested. This divestment amount resulted in a 3 month penalty period of June, July and August.
 7. Of the amounts listed in Finding of Fact #3, \$2,600 was paid to petitioner's sister-in-law for services provided over a four year period of time before petitioner moved into the nursing facility. Those services included keeping track of her finances, completing shopping and other errands, and assisting with household chores. The total amount of assistance provided was estimated at approximately 4-5 hours per week for the 4 year period. Exhibit 1
 8. On October 15, 2001 the county agency issued a negative notice denying Institutional MA for the month of September 2001 based upon an alleged divestment of \$18,850. The divestment penalty period was determined to be 4 months including June, July, August and September 2001. Eligibility for September 2001 and the alleged \$2,600 divestment which caused ineligibility for that month are the only issues under review. Exhibit 1

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Wis. Stat. §49.453(2)(a); MA Handbook, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Wis. Stat. §49.453(1)(f); MA Handbook, App. 14.3.0.

The ineligibility for MA due to divestment is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services."). The penalty period is specified in Wis. Stat. §49.453(3), to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services. The penalty period begins with the month of divestment and extends for the number of months that result from dividing the divested amount by the average nursing home cost to a private pay patient (\$4,075 for the time at issued). MA Handbook, Appendix 14.2.5. All factors are to be rounded downward.

In this particular case there is no dispute petitioner divested assets totaling \$16,250 as detailed in Finding of Fact #3. Petitioner and the county agree that petitioner divested that amount which correctly resulted in a penalty period of three months ($\$16,250/\$4,075 = 3.98$ rounded down to 3). That penalty period would run from June through August, 2001.

However, the county agency asserts petitioner also divested \$2,600 when petitioner paid her sister-in-law who assisted her for several years by performing personal services. The payment was issued to the sister-in-law in two payments just prior to petitioner's application for nursing home MA. There was no prior contract for services. The county agency cites the MA Handbook, Appendix 14.2.9 as support for its determination these payments were divestments. Therefore, the county agency combines the \$2,600

with the existing \$16,250 for a total divestment amount of \$18,850 and a penalty period of four months (\$18,850/\$4,075 = 4.62 rounded down to 4). The penalty period runs from June through September, 2001.

Petitioner alleges the \$2,600 in payments to petitioner's sister-in-law was not divestment and therefore the total amount divested should be reduced from \$18,850 to \$16,250. This would reduce the penalty period by one month, and petitioner would be eligible for nursing home MA effective September 1, 2001. Petitioner references Wis. Stat. §49.453 and asserts the assumption that services provided to a relative are provided free of charge is rebutted when the services: (1) are reasonable, (2) directly benefited the person served and (3) did not exceed 10% of the community spouse resource allowance limit.

The Wisconsin state statutes, Wis. Stat. §49.453, provides as follows:

(5) CARE OR PERSONAL SERVICES. For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets *to a relative as payment for care or personal services that the relative provides to the covered individual*, the covered individual or his or her spouse transfers assets for less than fair market value *unless [1] the care or services directly benefit the covered individual, [2] the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs and, [3] if the amount of the payment exceeds 10% of the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1., the agreement to pay the relative is specified in a notarized written agreement that exists at the time that the relative performs the care or services.*

(emphasis added)

In addition, the Medical Assistance Handbook, Appendix 14.8.0, **Divesting by Paying Relatives**, provides in relevant part, as follows:

It is **not** divestment if all of the following conditions exist:

- The services directly benefited the institutionalized person
- The payment did not exceed reasonable compensation for the services provided ("reasonable compensation" is the prevailing market rate for the service at the time the service is provided)
- If the amount of the total payment exceeds 10% of the community spouse asset share (23.4.2), the institutionalized person must have a written, notarized agreement with the relative.
- *If there is no community spouse, use 10% of the highest possible CSAS (community spouse asset share) in 23.4.2.*

(emphasis added)

However, Medical Assistance Handbook, Appendix 14.2.9 **Value Received**, provides as follows:

"Value received" is the amount of money or value of any property or services received in return for the person's property. The value received may be in any of the following forms: . . .

(5) Services which shall be assigned a valuation equal to the cost of purchase on the open market. Assume that services and accommodations provided to each other by family members or other relations were free of charge, unless there exists a written contract (made prior to the date of transfer) for payment.

The county agency cites Appendix 14.2.9 and asserts that any time services are provided to a relative without a contract those services are assumed to be provided free of charge. The county agency argues the payments by petitioner to her sister-in-law must therefore be considered a divestment.

However, petitioner asserts that there was no requirement for a written contract under the facts of this particular case. She argues that the assumption payment to a relative for services is divestment is overcome when the three elements at Wis. Stat. § 49.453(5) are met. Petitioner asserts the first element was met as the services, which consisted of housework, yardwork, financial work and shopping, directly benefited her. The county agency does not dispute this allegation.

Petitioner also asserts the second element is satisfied as the payments represent reasonable compensation for the services provided. In estimating approximately 3-4 per week, the payments for the period at issue amount to approximately the prevailing market rate for the service at the time the service was provided. Petitioner presents a 2001 Occupation Wage Survey Report to verify the reasonableness of those payments. The county agency does not dispute this allegation.

In regard to the third element, petitioner explains a written contract is needed *only if the amount of the payment exceeds 10% of the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1*. The community spouse resource allowance limit for the time period at issue was \$87,000. As the total payments at issue were \$2,600, they do not exceed 10% of the community spouse resource allowance of \$87,000. The county agency asserts this provision is in conflict with MA Handbook, Appendix 14.2.9.

The parties agree there is no written contract for the services petitioner's relative performed for her. However, although there is no written contract for the services provided, petitioner's attorney asserts there is no need for a written contract pursuant to Wis. Stat. §49.453 and MA Handbook, Appendix 14.8.0. The question is whether the provisions of MA Handbook, Appendix 14.2.9 are in conflict with the provisions of Wis. Stat. §49.453 and MA Handbook, Appendix 14.8.0 and require a contract for services in this particular case.

Based upon the above I conclude there was no need for a contract for the services provided. First, the services directly benefited petitioner and were clearly under \$8,700 limit established in Wis. Stat. §49.453 and MA Handbook, Appendix 14.8.0. Pursuant to that conclusion, I am also persuaded that the assumption in MA Handbook, Appendix 14.2.9 that services provided to a relative are free of charge does not apply where the services need not have been based upon a contract because those payments met the requirements of Wis. Stat. §49.453 and MA Handbook, Appendix 14.8.0.

Second, I note that Appendix 14.8.0 - which is consistent with Wis. Stat. §49.453 - is clearly titled "Divesting by Paying Relatives." Appendix 14.2.9 is titled "Value Received" and addresses situations where it is necessary to determine the value received in return for an MA recipient's "property." In this particular case, petitioner did not divest property, she paid her relative a cash payment. That circumstance is already clearly addressed in Appendix 14.8.0.

CONCLUSIONS OF LAW

That the \$2,600 in payments to petitioner's sister-in-law for services over a four year period were not divestment pursuant to Wis. Stat. §49.453 and MA Handbook, Appendix 14.8.0.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county agency with the following instructions: (1) remove the \$2,600 payment to petitioner's sister-in-law as a divestment from petitioner's case, and (2) certify petitioner for institutional MA for the month of September 2001. These actions are to be taken within ten (10) days of the date of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 28th day of
March, 2002.

/s Kenneth P Adler
Administrative Law Judge

Division of Hearings and Appeals
41/KPA

cc: